Case Number: PD-1137-16

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
AUSTIN, TEXAS

DAN DALE BURCH,
Appellant-Respondent

V.

THE STATE OF TEXAS,
Appellee-Petitioner

APPEALED FROM THE COURT OF APPEALS, 9th DISTRICT
AT BEAUMONT, TEXAS
CASE NUMBER: 09-14-00361-CR

221st District Court, Montgomery County, Texas
Trial Court Cause No. 13-05-05739-CR

APPELLANT'S BRIEF

Stephen D. Jackson
SBOT No. 00784324
Law Offices of Stephen D. Jackson
& Associates
215 Simonton
Conroe, Texas 77301
Phone: 936-756-5744
Facsimile: 936-756-5842
steve@stevejacksonlaw.com

Oral Argument Not Requested

Identity of Parties and Counsel

Judge:	Honorable Lisa Michalk 207 W. Phillips, 3rd Floor Conroe, Texas 77301 Phone: 936-756-0571
State's attorney in the trial court:	Ms. Tiana Sanford Assistant District Attorney Montgomery County District Attorney's Office SBOT No. 24012288 207 W. Phillips, 2nd Floor Conroe, Texas 77301 Phone: 936-539-7800
Appellant's attorney in the trial court:	Mr. Chad Etheridge SBOT No. 24043652 5111 Center Street Houston, Texas77007 Phone: 713-869-1155
Appellant:	Mr. Dan Dale Burch Holliday Unit 295 IH-45 North Huntsville, Texas 77348
Appellant's attorney on appeal:	Mr. Stephen D. Jackson Law Offices of Stephen D. Jackson & Associates SBOT No. 00784324 215 Simonton Conroe, Texas 77301 Phone: 936-756-5744

State's attorney on appeal:

Mr. Brent Chappell
Assistant District Attorney
Montgomery County District
Attorney's Office
SBOT No. 24087284
207 W. Phillips, 2nd Floor
Conroe, Texas 77301
Phone: 936-539-7800

Table of Contents

Index of Authorities

United State Supreme Court Cases

Texas Court of Criminal Appeals Cases

Texas Court of Appeals Cases

Texas Statutes

Statement of the Case

On January 27, 2014, the Appellant was indicted for Sexual Assault. (CR 22). On July 14, 2014, the Appellant pled not guilty and a jury trial commenced. (RR Vol. 3, 5:9-11). On July 17, 2014, the jury found the Appellant guilty of Sexual Assault. (RR Vol. 6, 144:21-24). The trial court sentenced the Appellant to seven years in prison. (RR Vol. 7, 20:21-22), (CR 166-168). The Appellant filed a Motion for New Trial on August 15, 2014 with sworn affidavits and exhibits attached. (CR 170-205). Notice of Appeal was filed on August 15, 2014. (CR 206). The Motion for New Trial was denied on August 21, 2014. (CR 205).

On August 24, 2016, the Ninth Court of Appeals affirmed Appellant's conviction but reversed and remanded the case back to the trial court for a new punishment trial. *Burch v. State*, No. 09-14-00361-CR, 2016 WL 4483087, at *6 (Tex. App.—Beaumont Aug. 24, 2016, pet. granted) (mem. op., not designated for publication). A motion for rehearing was not filed by either the Appellant or the State. Both the Appellant and the State each filed a petition for discretionary review.

On January 25, 2017, this Court denied Appellant's petition for discretionary review and granted the State's petition for discretionary review.

There is one volume of the Clerk's Record in trial court cause number 13-05-05739-CR which will be referred to as (CR xx). There are eight volumes of the

Reporter's Record that contain the voir dire, testimony, arguments and rulings and with volumes of exhibits which will be referred to as (RR Vol. x, xx:xx).

Statement Regarding Oral Argument

Appellant does not request oral argument.

Statement of the Facts

On January 26, 2008, the complainant Kayla James (hereinafter referred to as James) was working at a restaurant in Cleveland called Papa Ro's. (RR Vol. 4, 213:17-18). The Appellant, along with Kayla Mills (hereinafter referred to as Mills) and Jordan Galloway (hereinafter referred to as Galloway), were visiting her at work. (RR Vol. 4, 225:7-10). Galloway and James were close friends. (RR Vol. 4, 213:23-214:1). James' friends were hanging out at Papa Ro's waiting for her to get off work. (RR Vol. 5, 16:10-15). Michelle Stetson (hereinafter referred to as Michelle) also worked at Papa Ro's. (RR Vol. 5, 90:2-9). Appellant liked Michelle. (RR Vol. 5, 90:2-14). James believed that Appellant ended up at Papa Ro's because her friend Michelle was supposed to be there and go to Mills' house later that night. (RR Vol. 5, 90:2-14).

While at the restaurant, they decided to get some alcohol to take back to Mills' house. (RR Vol. 4, 225:6-23). Appellant gave $50.00 to Mills to go obtain alcohol, knowing that they would all get together later to drink. (RR Vol. 4, 225:16-17).

Galloway took Mills to the Joy Juice in Cleveland to purchase alcohol, including beer and Seagram's whiskey. (RR Vol. 4, 225:19-23).

James left Papa Ro's around 2:30-2:45 a.m. (RR Vol. 5, 230:16-19). James and Michelle leave Papa Ro's and James believes that Michelle was also going to Mills' house. (RR Vol. 5, 101:22-24). James drove Appellant's truck to Mills' house. (RR Vol. 5, 101:25-102:1). James believes that she arrived at Mills' house around 3:00 a.m. (RR Vol. 3, 230:23-231:1). James believed that Appellant was already at Mills' house when she arrived as were others, and that others also arrived later. (RR Vol. 3, 231:10-18). James testified that she played "beer pong" that night and does not recall if she was slightly "buzzed" or "falling down drunk." (RR Vol. 3, 231:22-25). She further testified that she drank beer and shots. (RR Vol. 5, 142:3-21). James testified that she had approximately eleven to twelve beers and about three shots of liquor. (RR Vol. 5, 142:3-21). James stated that she got drunk and passed out to the point that she "didn't even know what was going on." (RR Vol. 5, 142:7-10), (RR Vol. 5, 105:10-11). She was "wasted" and the last thing she remembers doing was kicking off her shoes before going to bed. (RR Vol. 5, 107:2-12). She then went and passed out in Mills' room. (RR Vol. 5, 107:5-10), (RR Vol. 5, 108:5-7).

Sergeant Miller stated that he was told that Mills and others saw Appellant in bed with James while they were getting ready for bed the night before. (RR Vol. 4, 227:6-11). Her next memory was waking up to Appellant pulling up her pants. (RR

Vol. 5, 108: 8-16). She testified that she got out of bed and told Appellant that she was going to the bathroom. (RR Vol. 5, 108:10-16), (RR Vol. 5, 115:24-116:13). The Appellant laid back down in bed. (RR Vol. 5, 117:1-4). Instead, James went to Mills' mother's room where Mills was sleeping. (RR Vol. 5, 117:8-11). James testified that she went to Galloway and tried to tell her what had happened. (RR Vol. 5, 117:15-18). They then called Justin Parris (hereinafter referred to as Parris) into the room and he called one of his friends. (RR Vol. 5, 118:5-10). They then called James' mother. (RR Vol. 5, 123:1-11). A Montgomery County Sheriff's Office deputy arrived and James and the others wrote out statements. (RR Vol. 5, 124:11-15). Upon being questioned by deputies, James was unable to tell them if she had been sexually assaulted. (RR Vol. 4, 231:18-232:3). Deputy Miller testified that he did not know if a sexual assault had occurred. (RR Vol. 4, 232:7-10). Appellant was still in bed when located by Deputy Miller. (RR Vol. 4, 215:20-22). Appellant told Deputy Miller that he did not remember what had occurred. (RR Vol. 4, 237:1-8). Deputy Miller was told that James had become very intoxicated. (RR Vol. 4, 226:14-23). Sergeant Miller determined that the only case they had probable cause to arrest for was providing alcohol to a minor. (RR Vol. 4, 230:25-231:17). Appellant and Mills were arrested. (RR Vol. 4, 233:5-7).

James went to the hospital for a sexual assault examination. (RR Vol. 3, 233:22-234:21). She was examined by SANE nurse Sandra Sanchez (hereinafter

referred to as SANE Sanchez). (RR Vol. 3, 26:11-18). SANE Sanchez testified that James was seen at Memorial Hermann hospital on January 27, 2008. (RR Vol. 3, 20:11-13). SANE Sanchez performed a sexual assault examination on James. (RR Vol. 3, 25:4-6).

James relayed to SANE Sanchez that she did not recall what happened in this case. (RR Vol. 3, 35:7-12). In fact, a lot of questions asked by SANE Sanchez to James were responded with "unknown." (RR Vol. 4, 20:18-20). James told Sanchez that she "didn't remember because she was asleep, passed out or didn't remember." (RR Vol. 4, 20:18-23). SANE Sanchez noted that James was sleepy. (RR Vol. 3, 36:16-21). SANE Sanchez noted she did not find any indication of trauma in the SANE examination. (RR Vol. 3, 37:8-18). SANE Sanchez further stated that no finding of trauma was not abnormal. (RR Vol. 3, 37:19-21). SANE Sanchez questioned James about alcohol use prior to coming in for treatment and she admitted to three shots of Seagram's 7 and 11 to 12 cans of beer. (RR Vol. 3, 51:1-7). Oral swabs, an oral smear, vaginal swabs and one vaginal smear, dried body fluids consisting of swabs from the mons pubs and labia majora, four anal swabs and one anal smear, a blood tube, fingernail swabbings, head hair combing and a toxicology kit with blood and urine were obtained and preserved for testing. (RR Vol. 3, 51:19-52:1), (RR Vol. 8, State's Ex. 18). The toxicology kit was obtained to

analyze James' system for alcohol and drugs. (RR Vol. 3, 52:18-21). It appears that several years go by with no law enforcement activity on the sexual assault allegation.

In 2010, District Attorney Investigator Erin Smith (hereinafter referred to as Investigator Smith) began looking for Appellant. (RR Vol. 4, 79:18-24). She wanted to locate Appellant in hopes of obtaining a swab to obtain a DNA sample. (RR Vol. 4, 80:18-21), (RR Vol. 4, 82:12-83:1). Investigator Smith testified that she was unable to locate Appellant on any of her databases that she uses to search for people. (RR Vol. 4, 83:21-84:17). For three years, Investigator Smith was unable to locate Appellant. (RR Vol. 4, 84:18-86:9). She stated that it appeared that something made him [Appellant] change his life right after the incident at James' house. (RR Vol. 4, 87:12-88:11). In 2013, Investigator Smith received a hit on a database and locating information on the Appellant in Kentucky. (RR Vol. 4, 88:23-89:10). Further work by Investigator Smith located the Appellant living in Liberty County. (RR Vol. 4, 91:5-11). A DNA swab was eventually obtained from the Appellant. (RR Vol. 4, 137:23-138:2). A DNA match for the Appellant's semen was obtained from the vaginal swab of James. (RR Vol. 4, 162-25:163:22).

The case at bar is a retrial from a previous mistrial where the jury was unable to reach a unanimous verdict. (RR Vol. 7, 4:1-7). During this trial, in a Texas Rules of Evidence 104(a) hearing, the State proposed to admit the testimony of Tracie

Syracuse (the married named for Tracie Burch, RR Vol. 5, 198:16:21), who is the ex-wife of the Appellant. (RR Vol. 5, 185:15-196:13).

The State informed the trial court that it intended to call the Appellant's ex-wife, Tracie Syracuse (hereinafter referred to as Syracuse). (RR Vol. 5, 185:23-25). In 2007, Syracuse made two separate written statements to law enforcement each containing descriptions of abusive verbal tirades, violent physical assaults and four violent forcible sexual assaults. (RR Vol. 5, 186:1-5) (RR Vol. 8, Exhibit 23). (RR Vol. 8, Exhibit 25).

In the 104(a) hearing to determine the admissibility of extraneous offenses, the State proffered that there were two instances of sexual assault alleged by Syracuse against Appellant. (RR Vol. 5, 184:14-21). The State explained that the allegations contained Appellant grabbing Syracuse and having sex with her against her will. (RR Vol. 5, 184:14-21). The State further elaborated that in both the extraneous allegations Syracuse alleged that she was grabbed, pulled, yelled at, called names, and sexually assaulted and that these two incidences would rebut the defensive theory of consent and was an exception under 404(b) to show the intent of Appellant. (RR Vol. 5, 186:21-187:3). Trial counsel properly objected under 404(b), objected that the proposed evidence was not relevant and also objected under Texas Rule of Evidence 403. (RR Vol. 5, 194:5-12). The trial court overruled the objections. (RR Vol. 5, 194:13). Over proper objection, the trial court articulated

that she was going to allow the extraneous offense testimony pursuant to the noted exceptions to Texas Rule of Evidence 404(b), to rebut the defensive theory of "consent" and to show the intent of Appellant. (RR Vol. 5, 194:22-23).

The Appellant was convicted of Sexual Assault. (RR Vol. 6, 144:21-24). Sexual Assault is an offense specifically listed in Article 42.12 §3g that prohibits court ordered community supervision after conviction. Tex. Code Crim. Proc. art. 42.12 § 3g.

In the punishment phase of the trial, the Appellant chose to have the trial court assess punishment. (CR 52). In the opening moments of the punishment phase of the trial, the trial judge states that she remembers in the previous trial (a first trial ended in a hung jury / mistrial) that the trial counsel submitted an application for probation but she cannot locate it in the file and the trial attorney is asking to supplement one. (RR Vol. 7, 4:1-9). The trial judge states that she is comfortable accepting the supplement as she "know[s] that his client is eligible" [for probation]. (RR Vol. 7, 4:8-12).

Trial counsel made an opening statement and informed the trial court that his client was "probation eligible" and that he would call two witnesses that would testify that the Appellant "could make probation." (RR Vol. 7, 5:13-6:2). Appellant's trial counsel called two witnesses, Aubry Burch (hereinafter referred to as Aubry) and his sister Debra McDonald (hereinafter referred to as Debra) and they both

testified that Appellant would be a good candidate for probation. (RR Vol. 7, 6:18-20:6). Trial counsel in the questioning of Aubry elicited testimony that the "judge can give him probation, anywhere from two to ten years." (RR Vol. 7, 8:6-12). He then proceeded to question Aubry if he understood what probation is and the ramification of violating the probation. (RR Vol. 7, 8:13-23). He also inquired as to whether or not Aubry believed that his brother could successfully complete a probation. (RR Vol. 7, 8:16-18). And finally, trial counsel asked Aubry if he is asking the court to give the Appellant probation which he responded "I am." (RR Vol. 7, 10:3-5). Even the State questioned Aubry about how he would support his brother while on probation. (RR Vol. 7, 10:14-16). Trial counsel then called Appellant's sister, Debra. (RR Vol. 7, 11:23-24). Debra was asked virtually the same type of probation questions as Aubry. (RR Vol. 7, 13:7-12), (RR Vol. 7, 14:25-15:10). Then in closing argument, the trial counsel again makes mention that the Appellant is probation eligible. (RR Vol. 7, 16:11-12), (RR Vol. 7, 16:23-17:5). In closing argument, even the State wrongly states the law that the Appellant is probation eligible but that the trial court should not grant probation. (RR Vol. 7, 17:8-18:3). The trial court articulated her thought process on the record and mentioned that she considered probation and the relevant parole laws and sentenced Appellant to seven years in the Texas Department of Criminal Justice. (RR Vol. 7, 19:21-20:22).

Summary of the Argument

Reply to Issue One: The Ninth Court of Appeals did not err when it decided that the trial court abused its discretion when it denied Appellant's motion for new trial because no reasonable review of the record could support the trial court's decision.

Reply to Issue Two: The Ninth Court of Appeals correctly concluded that the Appellant met his burden under *Strickland v. Washington* and *Riley v. State* to show that he was prejudiced by trial counsel's deficient performance. The record during trial and the affidavits submitted in the motion for new trial support the claim that Appellant would have chosen to have the jury assess punishment had he received the correct advice from his trial counsel because only the jury could assess community supervision in the event Appellant was found guilty. The Ninth Court of Appeals was correct in deciding that there is a reasonable probability the outcome of the proceeding would have been different had Appellant received the correct advice from his trial counsel.

Argument and Authorities

Reply to Issue One

The Ninth Court of Appeals did not misapply the standard in *Riley v. State*, 378 S.W.3d 453 (Tex. Crim. App. 2012), when it determined that the trial court abused its discretion when it denied Appellant's motion for new trial. The State argues that the Court of Appeals disregarded the trial court's implicit finding that

Appellant's affidavit was not credible when it denied the Appellant's motion for new trial. State's Appellate Br. 13. The State also argues that the Court of Appeals should have deferred to the trial court's credibility determinations because whether there was a reasonable probability the outcome of the proceedings would have been different is a mixed question of law and fact that turned on the trial court's determinations of historical fact and credibility. State's Appellate Br. 14.

An appellate court reviews a trial court's denial of a motion for new trial for an abuse of discretion. *Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012). A trial court's decision will only be reversed if the trial judge's opinion was clearly erroneous and arbitrary. *Id.* A trial court abuses its discretion if no reasonable view of the record could support the trial court's ruling. *Id.* Appellate courts should give almost total deference to historical facts and mixed questions of law and fact that turn on the evaluation of credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997) (en banc).

The Court of Appeals correctly found that the trial court abused its discretion in denying the motion for new trial because no reasonable review of the record supports the trial court's ruling. In effect, the State is arguing that the trial court did not believe that the Appellant would have changed his mind to have the jury determine punishment because it was inconsistent with his counsel's trial strategy. However, all the decisions made by Appellant and his trial counsel conclusively

confirm the stated goal in Appellant's affidavit: "to receive probation in the event that I was unfortunately convicted by the jury." (CR 185-186).

Prior to the beginning of trial, Appellant's counsel filed a notice to have the Judge assess punishment in the event of conviction. (CR 187). Appellant's counsel also filed an application for community supervision to have the Court grant Appellant community supervision in the event of a conviction. (CR 188). These actions are consistent with Appellant's goal of receiving community supervision if he is convicted. It is also consistent with the actions Appellant would have taken when he received the undisputed erroneous advice of his trial counsel that the Judge could place him on community supervision in the event of a conviction. (CR 183-184). The entirety of the punishment hearing in this case was to put on testimony to persuade the trial court to place the Appellant on community supervision. (RR Vol. 7, 4:1-17:5). Both of the witnesses, Aubry Burch and Debra McDonald, called by Appellant's counsel testified that Appellant would be a good candidate for community supervision. (RR Vol. 7, 9:16-10:5), (RR Vol. 7, 15:5-10). The basis for the testimony and strategy is confirmed in the affidavit of each witness. (CR 190-193). Both had been told by Appellant's counsel that the Appellant was eligible for community supervision from the Judge. (CR 190-193). At no time did the decisions made by the Appellant stray from his goal of receiving community supervision in the event of a conviction.

In this case, the implicit finding by the trial court that it did not believe the Appellant's affidavit is to be given deference by the reviewing court. However, in this case, unlike *Riley*, there was no testimony given by Appellant or his counsel on the motion for new trial. In this case, the only information before the trial court was the consistent urging by Appellant's counsel at trial that he was eligible for community supervision and that he continued to ask for community supervision even after the guilty verdict. In addition, the information in the affidavits supports this claim as well. All of the information before the trial court on which it could judge credibility and demeanor does not support the trial court's denial of the motion for new trial. The trial court's decision to deny the motion for new trial was an abuse of discretion because no reasonable review of the record could support the trial court's ruling.

Reply to Issue Two

The Ninth Court of Appeals correctly concluded that the Appellant had met his burden to show that he was prejudiced by his trial counsel's erroneous advice and that but for this advice there was a reasonable probability that the outcome of the proceeding would have been different. The State argues that the Court of Appeals effectively shifted the burden to the State to disprove prejudice rather than placing that burden on the Appellant. *See* State's Appellate Br. 15. The State also argues that regardless of whether the trial court accepted the Appellant's claim that he would

not have chosen for the Judge to assess punishment but for the advice of his trial counsel, the issue remains whether the correct advice would have changed the result of the proceeding. *See* State's Appellate Br. 16.

An ineffective assistance of counsel claim is analyzed under the two-prong test established in *Strickland v. Washington.* 466 U.S. 668, 687 (1984). First, the defendant must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 2008). The trial court looks to see if counsel was acting as a reasonably competent attorney would under the circumstances. *Ex parte McFarland*, 163 S.W.3d 743, 753 (Tex. Crim. App. 2005) (en banc). In this case, it is undisputed that Appellant's trial counsel's performance was deficient when he incorrectly advised Appellant that he would be eligible for community supervision from the Judge after being found guilty by the jury. *See* State's Appellate Br. 17.

Second, the defendant must prove that he was prejudiced by counsel's deficient performance. *Thompson*, 9 S.W.3d at 812. It must be shown that there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

When there is a claim of ineffective assistance of counsel where the complaint is based on counsel's mistake about the law regarding community supervision there

must be evidence that: (1) the defendant was initially eligible to receive community supervision, (2) counsel's advice to go to the trial judge for sentencing was not part of a valid trial strategy, (3) the defendant's decision to have the judge assess punishment was based on his attorney's erroneous advice, and (4) the defendant's decision would have been different if his attorney had correctly informed him of the law. *State v. Recer*, 815 S.W.2d 730, 731–32 (Tex. Crim. App. 1991) (en banc). *Riley* contains this same test for parts one through three but changes the fourth part. 378 S.W.3d at 458. Rather than Appellant having to show the defendant's decision would have been different had he been given the correct advice as in *Recer*, *Riley* requires the Appellant to show that the results of the proceeding would have been different had he been given the correct advice. *Riley*, 378 S.W.3d at 458.

First, Appellant was eligible for community supervision from a jury as shown in his sworn affidavit filed with the trial court. (CR 158-159). He further states that he has never before been convicted of a felony in this state, another state, or the United States. (CR 158-159). Second, the erroneous advice given to Appellant on his eligibility for community supervision by trial counsel cannot be considered valid trial strategy based on his trial counsel's affidavit because there is no reasonable trial strategy that can be deduced by misinforming Appellant as to his ability to receive community supervision from the Court after conviction. Third, Appellant stated in his affidavit attached to his Motion for New Trial that he was advised by trial counsel that

he was eligible for community supervision from the judge and that he listened to his trial counsel's advice and chose the judge for sentencing in the event of a conviction by the jury. (CR 185). Appellant further stated that had he known that he was not eligible for community supervision from the judge after being found guilty, he would have selected the jury to assess punishment. (CR 185). "I was eligible for probation. Had I known prior to the start of the trial that upon being convicted that I would not be eligible for community supervision from the judge in a punishment trial, I would have elected to go to the jury for punishment. My goal was to receive probation in the event that I was unfortunately convicted by the jury." (CR 185). Appellant meets the four part test set out in *Recer*. 815 S.W.2d at 731–32.

Under the test in *Riley* the Appellant has satisfied the first three parts of the test required to establish prejudice. However, in *Riley* the fourth part of the test is different from the test in *Recer*. The State's claim focuses on the fourth part of the test in that the Court of Appeals placed the burden on the State to disprove that the Appellant was prejudiced. This is based on a statement that the Court of Appeals was not confident that Appellant would not have received a better outcome than the one he received based on the punishment evidence and the jury's ability to actually recommend community supervision. *See* State's Appellate Br. 15.

This statement by the Court of Appeals is part of the reasoning used to support the fourth requirement in *Riley* that but for the erroneous advice of Appellant's trial

counsel, the results of the proceeding would have been different. *See Riley*, 378 S.W.3d at 458. In order for the Court of Appeals to determine if this test was met it had to consider whether based on the record there was a reasonable probability that existed which was sufficient to undermine confidence in the outcome. The statement by the Court of Appeals did not shift any burden to the State but rather supported the Court of Appeals' holding that Appellant had met his burden to show prejudice which undermined confidence in the outcome of the proceeding. This statement supported the Court of Appeals' holding that the erroneous advice of counsel led to a reasonable probability that the outcome of the proceedings would have been different because the jury rather than the judge would have determined punishment.

The Appellant is able to meet his burden to show prejudice by being able to show that there was a reasonable probability that the result of the proceedings would have been different had counsel accurately advised Appellant. *See Riley*, 378 S.W.3d at 458. In *Riley*, the appellant was told by his trial counsel that if he was convicted of murder by a jury that he would be eligible for community supervision from the jury. 378 S.W.3d at 455. The appellant was found guilty of murder and assessed a punishment of 50 years by the jury. *Id.* Appellant's trial counsel learned for the first time at the charge conference of the punishment trial that appellant was not eligible for community supervision. *Id.* As part of appellant's motion for new trial the appellant submitted an affidavit claiming had he not been given erroneous advice by

his trial attorneys about his eligibility for community supervision, he would have chosen to enter an open plea of *nolo contendre* to the trial court in the hopes that the trial court would place him on a deferred adjudication community supervision. *Id.* at 456. The trial court denied appellant's motion for new trial. *Id.*

The court of appeals reversed the appellant's conviction in *Riley*, finding that the erroneous advice of appellant's counsel regarding the appellant's eligibility for community supervision constituted ineffective assistance of counsel. *Id.* This Court reversed the court of appeals finding that appellant's counsel was not ineffective because appellant could not prove that, had he been properly advised by his counsel, there was a reasonable probability that his trial would have produced a different result. *Id.* at 460.

In determining whether a different result would have occurred if appellant had been given the correct advice, this Court found support for the trial court's implicit finding that it did not believe appellant's claim because it was inconsistent with his trial strategy of self-defense. *Id.* By entering an open plea of *nolo contendre* to the trial court, the appellant would have waived the ability to put forth a theory of self-defense at the guilt-innocence phase of trial. *Id.* In addition, at the hearing on the motion for new trial, appellant's counsel testified that he unaware of any murder case where a defendant plead open to the trial court and received deferred adjudication community supervision and that he has never advised a client to use

that strategy. *Id.* Lastly, the appellant's counsel called a probation officer to introduce evidence of appellant's good behavior while on a personal recognize bond. *Id.* This Court held that this evidence could have been considered as mitigation evidence by the jury to reduce appellant's length of punishment assessed. *Id.*

The Court of Appeals in this case correctly distinguished Appellant's case from that of the appellant in *Riley*. Had the Appellant in this case been given the correct advice there is a reasonable probability that the outcome of the proceedings would have been different.

First, the Appellant's claim that he would have gone to the jury for punishment had he received the correct advice is not inconsistent with his trial strategy. The Appellant defended the charge against him at the guilt-innocence phase of the trial to the jury. If he had received the correct advice he would have had the punishment phase of trial in front of the same jury. The correct advice would not have limited his defense and would have been consistent with the goal as stated in his affidavit which was to receive probation in the event he was found guilty.

Second, Appellant's goal of receiving community supervision in the event of a conviction is supported by common sense. Appellant was facing two choices. When one choice (the judge) gave him a zero percent chance of community supervision and the other choice (the jury) gave him a possibility of community supervision then it defies common sense to not believe that Appellant would choose

the option that gave him the possibility of receiving community supervision rather than the alternative which would guarantee being sentenced to prison.

Third, the Court of Appeals did not improperly speculate on whether the weight of the evidence would have changed the outcome of the punishment trial. The Court of Appeals pointed to specific instances in the record for a basis that there was a reasonable probability that the outcome of the punishment trial would have been different had Appellant been given the correct advice. *Burch v. State*, No. 09-14-00361-CR, 2016 WL 4483087, at *6 (Tex. App.—Beaumont Aug. 24, 2016, pet. granted) (mem. op., not designated for publication).

When Appellant is deprived of his ability to make an informed decision on an election as to punishment and this error is not discovered until after the conclusion of the punishment trial, it undermines confidence in the outcome. Contrary to the State's brief, Appellant did not get exactly what he intended. By choosing to go to the trial court for punishment he intended to have the option of being placed on community supervision. Instead, Appellant was before a judge that by law could not place him on community supervision and before a judge who was also unaware that the law did not allow her to place Appellant on community supervision. It is pure speculation to conclude that because the trial court erroneously considered community supervision when it was not an option that a jury would have made the same decision. *See* State's Appellate Br. 18. Deference to the trial court under an

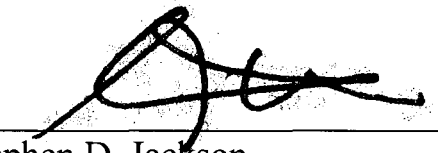
abuse of discretion standard should not allow trial counsel's erroneous advice and the trial court's lack of understanding regarding Appellant's eligibility for community supervision deny Appellant a punishment trial to a jury. Appellant is seeking what he originally intended but did not get because of the erroneous advice of his trial counsel: a punishment trial before a fact finder who could legally consider community supervision in the event of a conviction.

Prayer for Relief

Appellant respectfully prays that this Court affirm the decision of the Court of Appeals on Appellant's third issue and remand the case to the trial court for a new punishment trial.

Respectfully submitted,

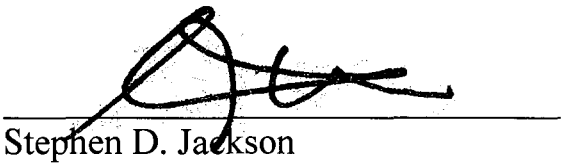
Law Offices of Stephen D. Jackson & Associates
215 Simonton
Conroe, Texas 77301
(936) 756-5744
(936) 756-5842 facsimile

By: 

Stephen D. Jackson
Texas Bar Number 00784324
Attorney for Appellant

Certificate of Service

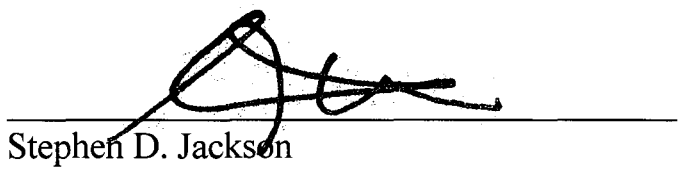
I certify that true and correct copies of the above Appellant's Brief were served on the State Prosecuting Attorney and the Montgomery County District Attorney's Office, at 207 W. Phillips St., Second Floor, Conroe, Texas 77301, by electronic service on March 27, 2017.



Stephen D. Jackson

Certificate of Compliance

I certify that a copy of the above and foregoing Petition for Discretionary Review has a word count of 4,930 after excluding the contents listed in Texas Rule of Appellate Procedure 9.4(i)(1).



Stephen D. Jackson